IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1686

LEO SHEEP COMPANY and PALM LIVESTOCK COMPANY,
Petitioners,

v.

UNITED STATES OF AMERICA,
SECRETARY OF THE INTERIOR, and
DIRECTOR, BUREAU OF LAND MANAGEMENT,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF OF AMERICAN LAND TITLE ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITION

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The American Land Title Association has obtained and filed with the Clerk of the Court letters from counsel for Petitioners and Respondents consenting to the filing of this Brief in Support of the Petition for Certiorari.

OPINIONS BELOW

The opinions of the United States Court of Appeals for the Tenth Circuit are reported at 570 F.2d 881, 890, and are reprinted in Appendix B to the Petition for Certiorari.

QUESTIONS PRESENTED

1. Whether land grants made under the Union Pacific Railroad Act of 1862 can properly be construed to have reserved to the United States an implied easement across lands granted under the Act.

2. Whether, in the absence of an express reservation of an easement in the Act, the United States is required by the Fifth Amendment to exercise its sovereign power of eminent domain to obtain a right of way easement across privately owned lands.

3. Whether the United States is precluded under common law doctrines from asserting a right to an implied easement of necessity.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fifth Amendment to the United States Constitution which provides, in pertinent part:

> No person shall be . . . deprived of property, without due process of law; nor shall private property be taken for public use, without just compensation.

This case also involves the Act of July 1, 1862, ch. 120, §§ 3, 4, 12 Stat. 489, 492, *as amended,* Act of July 2, 1864, ch. 216, § 4, 13 Stat. 356, 358, known as the "Union Pacific Act," and the Unlawful Inclosures of Public Lands Act of 1885, 23 Stat. 321, 43 U.S.C. §§ 1061-66, which are reprinted in Appendix C to the Petition for Certiorari.

INTERESTS OF AMICUS CURIAE

The American Land Title Association is a national organization representing approximately 2,000 title insurance companies, title companies and abstractors in the United States who search, examine and insure titles to land. The Association and its members have a direct and substantial interest in protecting titles of property owners which have been insured by its member underwriters. Additionally, the Association has a vital interest in promoting the security and stability of land titles generally.

The Court can judicially notice the fact that the majority of lands privately owned in the western states were acquired under Federal grant programs and patents issued pursuant to such grants. Approximately 34.5 million acres of land was originally granted to the Union Pacific Railroad and a substantial portion has been transferred and conveyed to others. The land granted to the Union Pacific alternated in sections with lands retained by the United States and created what is often referred to as "checkerboard" lands. Approximately 131 million acres of land was granted under the Union Pacific Act and other railroad acts.[1] The sweeping implications of the Court of Appeals decision are indicated in the following map which shows that property conveyed to the railroads under land grants extends through more than one-half of the States.

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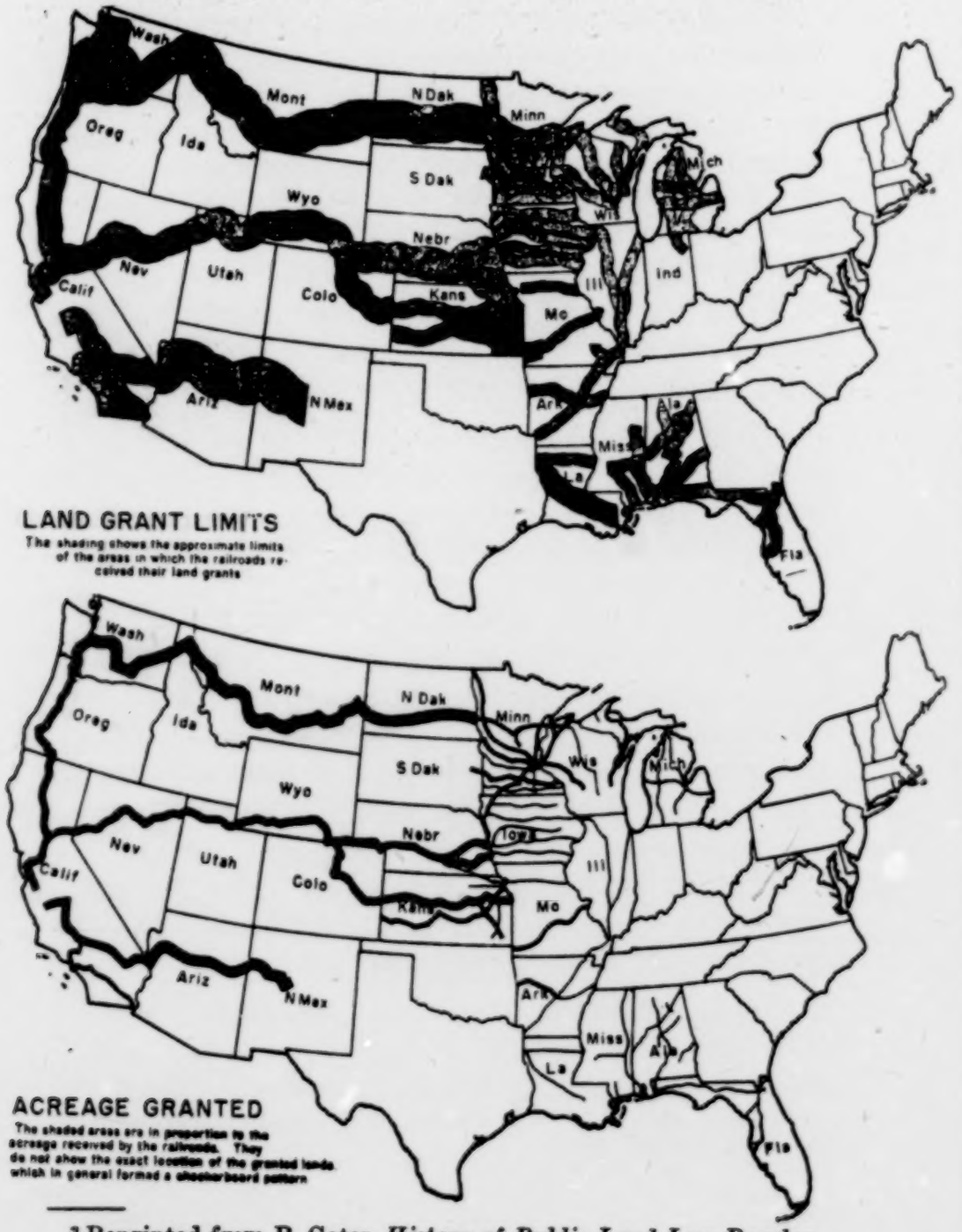
[1] *See,* P. Gates, *History of Public Land Law Development,* 345-46, 356-79, 384-85 (1968).

FEDERAL LAND GRANTS FOR RAILROADS[2]



[2] Reprinted from P. Gates, *History of Public Land Law Development* at 344.

In addition to railroad grants, under similar statutory programs, 17 million acres of land to states and private parties was granted by Congress for the construction of roads, canals and other internal improvements. Thus, without considering lands granted under the Homestead Act, Preemption Acts, and other programs, it becomes apparent that any decision affecting titles derived from the railroad grants has enormous implications.

Owners of millions of acres of land in 29 states have been assured, not only by title insurance companies, but by lawyers' title opinions, that their titles are good subject to defects and encumbrances of record. Since the easement for access to lands retained by the United States has not been a matter of any public record and was not an express reservation in the Act of July 1, 1862, 12 Stat. 489, there was no way for a search of the title to disclose such an encumbrance. Such property has been bought, sold and otherwise transferred for over 110 years with neither actual nor constructive notice of any claim of an implied easement in favor of the United States as a proprietor of retained lands.

Since the decision of the Tenth Circuit does not, by its language, limit its ruling to "checkerboard" lands, it may become a precedent in the statutory construction of other federal (and possibly state) statutes, the Association submits that it is of the utmost importance that the decision be reviewed by this Court.

The present and potential impact of the decision by the Court of Appeals is incapable of measurement at this time. This case purports to involve access to the eastern side of the Seminoe Reservoir which did not exist until nearly 70 years after the grant and patents

to the Union Pacific Railroad. It is not unreasonable to assume that the Federal Government will develop other large recreation areas on public domain lands previously unused or unimproved and attempt to build highways across privately owned property to reach its lands. The language of the Court of Appeals opinion does not limit the nature, purpose, or location of the easement it has concluded must exist over private property on the novel theory that Congress implied a reservation of such an easement in the original Act by omitting any reference thereto; and without considering whether that intention was mutual or merely unilateral.

Thus, the members of this Association as insurers of titles, and attorneys who render opinions as to the state of titles, must hereafter exhibit to prospective transferees of lands derived from federal and state grants, an exception, as an encumbrance on the title, for the claimed easement; and each may very well be subjected to claims for liabilities of staggering amounts to persons who have already received such insurance or opinions.

STATEMENT OF THE CASE

Amicus, American Land Title Association adopts the petitioner's statement of the case.

REASONS FOR GRANTING THE WRIT

By a 2 to 1 vote the Court of Appeals for the Tenth Circuit adopted a judicial construction of the Union Pacific Act of 1862 which operates to create an easement by implication across all odd-numbered sections granted to the railroad under the Act.[3] An easement

[3] References herein to the "Union Pacific Act" or "Act" include amendments enacted in 1864.

of undefined scope, nature, purpose, or location is now imposed on millions of acres of land which was originally granted by Congress to the railroad without regard to the fact that untold numbers of persons have, in the intervening 116 years, acquired the same property as *bona fide* purchasers.

In construing the Act, there was no consideration by the Court of Appeals of the direct and potential adverse impact its decision was likely to have on a vast number of property owners in this country or the effect, as precedent, of its broad holding. If the decision stands it is conceivable that titles to several hundred million acres of land in the West, Midwest, and South will be subject to similar implied easements of access of undefined description, nature and extent. It is reasonably anticipated that the decision below will be cited often for a broad holding that in any grants by Congress, an implied easement was reserved.[4] This result is not prevented by any limitation in the language of the Court of Appeals opinion.

The American Land Title Association recognizes the primary question is whether the Court of Appeals properly construed congressional intent. There are very strong reasons to support a review of the decision on this basis alone. At the same time, as *amicus curiae,* the Association is concerned that a decision having such far-reaching implications and involving important issues of basic property law was decided by the Court of Appeals reviewing a summary judgment predicated

[4] Because so many titles will be affected, the granting of the writ sought by the petitioners may well serve to forestall the filing of a multitude of cases in state and federal courts which otherwise must inevitably occur.

upon a limited stipulation of facts and issues. The Court of Appeals decision and the 4-3 vote to deny rehearing *en banc* reflect the importance of this case of first impression and the uncertainties which attended its decision.

I. In Construing The Union Pacific Railroad Act of 1862 To Have Reserved, By Implication, An Easement Across Lands Conveyed Under The Act, The Court of Appeals Disregarded Fundamental Rules of Statutory Construction

The Court of Appeals recognized that it was bound to look solely to the intent of Congress in 1862 to determine whether an implied easement of access was reserved by the United States. *Missouri, Kan. & T. Ry. Co.* v. *Kan. Pac. Ry. Co.*, 97 U.S. 491 (1878). Nonetheless, in disregard of fundamental rules applicable to ascertaining congressional intent, the Court of Appeals purported to infer such intent from a later enacted statute, the Unlawful Inclosures of Public Lands Act of 1885, 23 Stat. 321, 43 U.S.C. §§ 1061-66, and the decisions of this Court in *Camfield* v. *United States*, 167 U.S. 518 (1897) and *Buford* v. *Houtz*, 133 U.S. 320 (1890).

The Union Pacific Act does not by any words used in the Statute reserve to the United States an easement of access to retained sections across the alternate sections granted to the railroad. Nor do any facts appear in this record even suggesting that the grants were accepted by the railroad with any such understanding. The language of the Act, as amended, is unambiguous. Under the express language of the Act, Congress granted to the railroad

> "... every alternate section of public land, designated by odd numbers, to the amount of five alternate sections per mile on each side of said railroad ... and within the limits of ten miles on each side of said road, not sold, reserved, or otherwise disposed of by the United States, and to which a preemption or homestead claim may not have attached, at the time the line of said road is definitely fixed: *Provided*, That all mineral lands shall be excepted from the operation of this act; but where the same shall contain timber, the timber thereon is granted to said company. And all such lands, so granted by this section, which shall not be sold or disposed of by said company within three years after the entire road shall have been completed, shall be subject to settlement and preemption, like other lands ...."[5]

The legislative history is devoid of any reference to easements for rights of way to reach retained lands and provides no basis for inferring an intent inconsistent with the actual language of the Act. This Court has previously refused to interpret the Union Pacific Act in such a way as to imply an intent to reserve rights not expressly reserved in the Act. *Missouri, Kan. and T. Ry. Co.* v. *Kansas Pac. Ry. Co., supra.* It is apparent that Congress was not concerned in 1862 with retaining rights-of-way for access to lands not conveyed to the railroad. The legislative history of the Union Pacific Act and the various grant programs, e.g., the Homestead Act, Preemption Acts and other statutory grant programs to the States demonstrates an intent by Congress to dispose of, and not retain, public

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[5] Act of July 1, 1862, ch. 120, § 3, 12 Stat. 489. The inclusion of express reservations in the original grant negatives an inference of an implied intent to retain an easement. The Amendment of 1864 expanded the grant from five to ten alternate sections per mile on either side of the railroad to a limit of twenty rather than ten miles on each side.

lands.[8] Not until 1891 did Congress indicate an intent to retain public lands when it authorized the President to reserve forest lands. *See*, Act of March 3, 1891, ch. 561, 624, 26 Stat. 1103.

Even if the Union Pacific Act were ambiguous on its face and the legislative history doubtful, the Court of Appeals was obligated to consider and give weight to the administrative history of the Act. *See, United States* v. *Union Pac. R. Co.*, 148 U.S. 562, 571-72 (1893). The Court of Appeals disregarded entirely administrative interpretation and practice under the Act. The dissenting opinion in the Appellate Court succinctly points to the failure of the majority's analysis by noting:

> "Significantly, the United States did not believe lieve for the past 110 years that it was endowed with the gratuities found in the majority opinion. This is evidenced in the uncontroverted finding of the District Court which goes far to prove the correctness of the decision we reverse: 'For 110 years after the grant of the fee lands to the Union Pacific Railroad Company, neither the Department of the Interior nor any other agency or agent of the United States construed the grant or the patents issued pursuant thereto as conferring any right upon the United States, its agents or the public to traverse the lands granted to the railroad, and the administrative construction should be given great weight in the event of doubt concerning the scope of the grant."
>
> 570 F.2d at 889.

[8] Grants of alternate sections of land for railroads, canals and other internal improvements were justified by proponents on the basis that retained sections would have an increased sale value and the government would recover the value of the land donated. *See generally*, P. Gates, *History of Public Land Law Development*, *supra*.

It is settled law that when a Government grant does not reserve a right or interest that would ordinarily pass by the rules of law, and the Government does no act which indicates an intention to make such a reservation, the grant includes all that would pass by it as if it were a private grant.' *Hardin* v. *Jordan*, 140 U.S. 371 (1891); *Stewart* v. *Lamm*, 289 P.2d 916, 918 (Colo. 1955). In its opinion denying rehearing, by a 2-1 vote, the Court of Appeals conceded that the Government itself had not relied on the theory of an implied reservation of an easement in the 1862 grant in the trial court.[9]

This Court long ago held that a statutory construction which disturbs numerous titles should not be adopted unless it is clearly the proper construction. *See, e.g., Doolittle's Lessee* v. *Bryan*, 14 How. 563 (1852) and *Beals* v. *Hale*, 4 How. 37 (1846). The statutory construction adopted by the Court of Appeals is

[7] In *Moore* v. *Robbins*, 96 U.S. 530 (1878) this Court, citing its earlier decision in *United States* v. *Stone*, 2 Wall. 525 (1865) reiterated the view that a patent is the highest evidence of title, conclusive against the government and all claiming under junior patents or titles. Once a patent has issued, assuming it issued under the scope of authority, the Government ceases to have any further control over the land conveyed. As the Court in *Moore* v. *Robbins*, *supra* at 533 noted:

> "If this were not so, the titles derived from the United States, instead of being the safe and assured evidence of ownership which they are generally supposed to be, would be always subject to the fluctuating, and in many cases unreliable, action of the Land Office. No man could buy of the grantee with safety, because he could only convey subject to the right of the officers of the government to annul his title."

[9] This concession is significant since the Court of Appeals expressed doubt as to the congressional intent and noted in its opinion that "To resolve fully what is to us a rather complex problem by summary judgment is perhaps overly ambitious." 570 F.2d at 884.

not itself free from doubt. If left to stand it will jeopardize titles of numerous persons who are successors-in-title to the railroads, who have given consideration for their titles, but, who had neither actual nor constructive notice of the servitude which the decision purports to impress on their lands.

II. In The Absence Of An Express Reservation Of An Easement, The United States Is Required By The Fifth Amendment To Exercise Its Power Of Eminent Domain To Take Private Property

Neither the Union Pacific Act nor the patents issued pursuant to the Act expressly reserves to the United States an easement of right-of-way across lands granted to the railroad. The decision of the Court of Appeals operates to take private property without compensation in violation of rights guaranteed by the Fifth Amendment to the United States Constitution. By construing the later enacted Unlawful Inclosures of Public Land Act to establish congressional intent to reserve an implied easement in the Union Pacific Act, the Court of Appeals has circumvented the mandate of the Fifth Amendment.[9]

It is settled law that the United States cannot consistent with due process of law legislate back to itself lands previously granted without making compensation. *Union Pacific R.R. Co.* v. *United States*, 99 U.S. 700, 720 (1879); *See also, United States* v. *Rindge*, 208

[9] For reasons addressed in the petitioner's brief, which are not repeated by this amicus, the Unlawful Inclosures of Public Land Act and cases decided under that Act, i.e., *Camfield* v. *United States, supra*, and *Buford* v. *Houts, supra*, relied on by the Court of Appeals are inapposite and do not support the conclusion reached by the Court below.

F. 611 (S.D.Cal. 1913)."[10] The novel construction imported into the Union Pacific Act by the Court of Appeals accomplishes this unconstitutional result.

The District Court impliedly recognized that petitioners' Fifth Amendment rights to just compensation were being evaded by the Government's actions in concluding that:

> "Easements may not be implied in patents in favor of the United States because the sovereign power of eminent domain permits the United States to condemn such rights of way as may be reasonably required for access to any public lands under Rule 71A, Federal Rules of Civil Procedure."[11]

The Court of Appeals completely ignored the constitutional issue implicit in its decision to impose a public servitude on privately owned lands without payment of compensation. Other courts have rejected claims of easements reserved by implication or easements by necessity on the part of government generally as contrary to rights acquired by patentees of public lands and guaranteed by the Constitution. *See, United States* v. *Rindge, supra* at 619-20; *accord, Pearne* v. *Coal Coke Co.*, 90 Tenn. 619, 18 S.W. 402 (1891); *Bully Hill Copper Mining and Smelting Co.* v. *Bruson*, 4 Cal. App. 180, 87 P. 237 (1906); *Thomas* v. *Morgan*, 113 Okla. 212, 240 P. 735 (1925); *State* v. *Black Bros.*, 116

[10] In *Rindge* the District Court rejected the United States' assertion of an implied reservation of a public right-of-way across patented lands to reach public lands. The issue was ultimately resolved when the Los Angeles legislative body adopted resolutions condemning a portion of the private property thus requiring compensation to the landowner. *See, Rindge Co.* v. *Los Angeles County*, 262 U.S. 700 (1923).

[11] *See, Petitioners' Brief*, Appendix A.

Tex. 615, 297 S.W. 213 (1927); *Guess* v. *Azar*, 57 So.2d 443 (Fla. 1952); *see also, Seaway Co.* v. *Attorney General*, 375 S.W.2d 923 (Tex. 1964).

The Fifth Amendment requires not only payment of just compensation to persons whose property is taken by the United States for public purposes, but that no property be taken without due process of law. The petitioners in this case and thousands of others owning property in railroad land grant areas have been effectively, by the Court of Appeals decision, deprived of one element of their ownership of their land without compensation.

III. The United States Should Be Precluded From Asserting An Easement By Necessity Where Such A Claim Has Not Been Made For Over 110 Years and Where The Claim Is Inconsistent With Common Law Principles

Assuming *arguendo* the Court of Appeals erred in concluding that Congress intended, by implication, to reserve an easement of access to retained lands, the United States is precluded from now attempting to establish a common law easement of necessity.

A common law easement of necessity can be implied only when the necessity existed at the time of the grant. *See*, 3 *Tiffany Real Property*, § 793 (3rd ed. 1939). The Seminoe Reservoir was not in existence in 1862 and therefore the necessity for public access was nonexistent. Further, strict necessity is required to establish an implied easement to remaining lands of a grantor where the grantor has not expressly reserved such an easement. *See, United States* v. *Rindge, supra.*

Implied easements of necessity are not favored where reciprocal benefits are not received by the conveyor and

conveyee. *Restatement of Property* § 476, comment h (1944). It is settled that an easement across public lands cannot be created by implication. *See, Utah Power & Light Co.* v. *United States*, 243 U.S. 389 (1917); *United States* v. *Union P. R. Co.*, 353 U.S. 112, 116 (1957); *see also, Tarpey* v. *Madsen*, 178 U.S. 215, 227 (1900); *Missouri, Kan. & T. Ry. Co.* v. *Kan. Pac. Ry. Co., supra.* Thus, private landowners should not be compelled to suffer the burdens of such an easement.

If the United States were entitled to claim a common law easement by necessity it would be required to show that there were no alternative means for acquiring access--which it cannot do since it has the power of eminent domain. *See, United States* v. *Rindge, supra.*[11]

The record before the trial court is not sufficient to establish a "way of necessity". There was no showing as to the use of the public lands prior to the conveyance to the railroad to ascertain the extent of the purported easement. *See, Restatement of Property*, § 483, comment i (1944).

The nature of the use which is to be made of the petioners' property is obviously far expanded over any use existing at the time of the grant. However, there was no evidence in the trial court to ascertain whether different or additional uses were permissible, assuming *arguendo* an implied easement may exist.

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[11] The trial court rejected the Government's claim of implied easement by necessity by finding that it had the power of eminent domain. Even if the availability of eminent domain were not the sole criteria, the stipulated facts presented to the trial court do not establish a common law easement.

To the extent the United States may resort to common law rules to create an implied easement of necessity, it should be precluded from asserting such a claim in this case.[13]

Where the United States is acting in a proprietary capacity it should be subject to the same rules which govern transactions between private property owners.[14] The equitable doctrine of estoppel has been applied to preclude the United States from asserting claims where required by justice and fair play. *See, United States* v. *Lazy FC Ranch, supra; see also, Moser* v. *United States, supra; Snake River Ranch* v. *United States,* 395 F.Supp. 886 (D.Wyo. 1975), *aff'd,* 542 F.2d 555 (10th Cir. 1976); *Brandt* v. *Hickel,* 427 F.2d 53 (9th Cir. 1970); *United States* v. *Georgia-Pacific Co.,* 421 F.2d 92 (9th Cir. 1970); *Tonkonogy* v. *United States,* 417 F. Supp. 78 (S.D.N.Y. 1976); *Shell Oil Co.* v. *Kleppe,* 426 F. Supp. 894 (D.Colo. 1977). The petitioners acquired titles as *bona fide* purchasers without notice of the easement first claimed by the United States more than 110 years after the grant to petitioners' predecessor in title. In numerous cases the Court has barred claims by the United States to set

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[13] Implied easements created under common law doctrines must necessarily be subject to common law doctrines applicable to their extinction, e.g., abandonment, estoppel, prescription and adverse possession. *See, Restatement of Property,* §§ 497-505 (1944).

[14] While a stronger case can be made that the equitable defense of estoppel should be applied where the government is acting in its proprietary capacity, it has been held, under certain circumstances that the equitable doctrine of estoppel may be applied where the government is acting in its sovereign capacity. *See, Moser* v. *United States,* 341 U.S. 41 (1951); *Schuster* v. *C.I.R.,* 312 F.2d 311 (9th Cir. 1962); *see also, United States* v. *Lazy FC Ranch,* 481 F.2d 985, 989 n.5 (9th Cir. 1973).

aside patents against such *bona fide* purchasers. *United States* v. *Marshall Silver Mining Company,* 129 U.S. 579, 589 (1889); *United States* v. *Burlington & Mo. Riv. R. R. Co.,* 98 U.S. 334, 342 (1879).

The United States should be barred by laches where it is obvious that property has been conveyed and transferred for many decades without any knowledge that these lands were burdened with a public right-of-way. *See, United States* v. *Fullard-Leo,* 66 F.Supp. 782 (D. Hawaii 1944); *cf., The Falcon,* 19 F.2d 1009 (D. Md. 1927).

In summary, the American Land Title Association respectfully submits that the Court of Appeals seriously erred in finding a congressional intent to reserve an easement in the Union Pacific Act. In the absence of a clear intent by Congress in 1862 to reserve an easement for public access, the United States, at best, could claim only a common law implied easement of necessity. In the record before the trial court there was no evidence to support such an easement which, in any event, would be barred at this late date.

CONCLUSION

For the reasons stated, *amicus* urges that the petition for writ of certiorari be granted.

Respectfully submitted,

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